

**TAB 2**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

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IN RE: PHARMACEUTICAL ) MDL NO. 1456  
INDUSTRY AVERAGE WHOLESALE ) CIVIL ACTION  
PRICE LITIGATION ) 01-CV-12257-PBS  
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THIS DOCUMENT RELATES TO )  
United States of America, et al,) Judge Patti B.  
Ven-a-Care of the Florida Keys, ) Saris  
Inc., )  
vs. )  
Boehringer Ingelheim, Corp., ) Chief Magistrate  
et al. ) Judge Marianne B.  
Civil Action 07-10248-PBS ) Bowler  
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(Cross-caption appears on following page)

VIDEOTAPED DEPOSITION OF SHELDON BERKLE

VOLUME I

Naples, Florida

Friday, October 31, 2008

<p style="text-align: right;">26</p> <p>1 Altus?</p> <p>2 <b>A. May 2005.</b></p> <p>3 Q. Prior to that time where did you work?</p> <p>4 <b>A. Just prior to that I had been retired</b></p> <p>5 <b>for just over a year, and prior to that with</b></p> <p>6 <b>Boehringer Ingelheim in the United States, and</b></p> <p>7 <b>prior to that in Canada.</b></p> <p>8 Q. When you say Boehringer Ingelheim in</p> <p>9 the United States, do you mean Boehringer</p> <p>10 Ingelheim Pharmaceuticals, Incorporated?</p> <p>11 <b>A. Correct.</b></p> <p>12 Q. Is it okay if we refer to that</p> <p>13 sometimes today as BIPI?</p> <p>14 <b>A. Yes.</b></p> <p>15 Q. Is BIPI part of a larger family of</p> <p>16 companies?</p> <p>17 MR. GASTWIRTH: Objection to form.</p> <p>18 THE DEPONENT: Yes, it is.</p> <p>19 BY MR. FAUCI:</p> <p>20 Q. Is that -- Is it okay if I call that</p> <p>21 sometimes the Boehringer Ingelheim family of</p> <p>22 companies?</p>	<p style="text-align: right;">28</p> <p>1 <b>A. Yes, there was.</b></p> <p>2 Q. When was that?</p> <p>3 <b>A. It was November 1994.</b></p> <p>4 Q. And when did you stop working for</p> <p>5 Boehringer Ingelheim's American operations?</p> <p>6 <b>A. The end of 2003.</b></p> <p>7 Q. Upon transfer to the U.S., which</p> <p>8 specific entity did you work for?</p> <p>9 <b>A. BIPI.</b></p> <p>10 Q. BIPI. What was your position there?</p> <p>11 <b>A. Executive vice president.</b></p> <p>12 Q. Executive vice president.</p> <p>13 Did you have -- Did you have a position</p> <p>14 at any other Boehringer Ingelheim entities in</p> <p>15 America at that time?</p> <p>16 MR. GASTWIRTH: Objection to form.</p> <p>17 THE DEPONENT: I was a vice president</p> <p>18 for BI Corporation.</p> <p>19 BY MR. FAUCI:</p> <p>20 Q. Is it okay if we refer to that as BIC?</p> <p>21 <b>A. Sure.</b></p> <p>22 Q. What about a company known as Roxane</p>
<p style="text-align: right;">27</p> <p>1 MR. GASTWIRTH: Objection to form.</p> <p>2 THE DEPONENT: Are you referring to the</p> <p>3 U.S. family or to the worldwide family?</p> <p>4 BY MR. FAUCI:</p> <p>5 Q. To the worldwide family I guess. If I</p> <p>6 -- If I use Boehringer Ingelheim family, I'm</p> <p>7 talking about the whole broad --</p> <p>8 <b>A. The whole shebang.</b></p> <p>9 Q. The whole shebang.</p> <p>10 <b>A. That's fine.</b></p> <p>11 Q. When did your employment begin with any</p> <p>12 Boehringer entity and the Boehringer Ingelheim</p> <p>13 family of companies?</p> <p>14 <b>A. 1973.</b></p> <p>15 Q. With what entity?</p> <p>16 <b>A. Boehringer Ingelheim Canada.</b></p> <p>17 Q. And obviously that's a Canadian</p> <p>18 company?</p> <p>19 <b>A. Correct.</b></p> <p>20 Q. Was there a point in time when you</p> <p>21 transferred to Boehringer Ingelheim's American</p> <p>22 operations?</p>	<p style="text-align: right;">29</p> <p>1 Laboratories, did you have a position with them?</p> <p>2 MR. GASTWIRTH: Objection to form.</p> <p>3 THE DEPONENT: No.</p> <p>4 BY MR. FAUCI:</p> <p>5 Q. Can you describe in general the</p> <p>6 business of BIPI in the 1994 time frame. By</p> <p>7 business I mean, among other things, what types</p> <p>8 of products was the company marketing or selling?</p> <p>9 <b>A. Again, it was involved in the research;</b></p> <p>10 <b>basic research, clinical research and marketing</b></p> <p>11 <b>sales of human pharmaceuticals. It was a</b></p> <p>12 <b>relatively smaller company in the U.S.</b></p> <p>13 <b>pharmaceutical business. And we were involved in</b></p> <p>14 <b>a couple therapeutic areas at that point,</b></p> <p>15 <b>respiratory medicine predominantly.</b></p> <p>16 Q. Were most of BIPI's products branded</p> <p>17 drugs or generic drugs?</p> <p>18 <b>A. Branded drugs.</b></p> <p>19 Q. Can you describe the business of BIC at</p> <p>20 about the same time, the 1994 time frame.</p> <p>21 <b>A. My understanding of what BIC was was</b></p> <p>22 <b>really as a holding company for the U.S.</b></p>

<p style="text-align: right;">30</p> <p>1 Q. Is it fair to say that BIC didn't have</p> <p>2 any active business of its own?</p> <p>3 A. Correct.</p> <p>4 Q. Can you -- Are you familiar with a</p> <p>5 company known as Roxane Laboratories?</p> <p>6 A. Yes, I am.</p> <p>7 Q. Can you describe their business</p> <p>8 generally.</p> <p>9 MR. GASTWIRTH: Objection to form.</p> <p>10 THE DEPONENT: My understanding of</p> <p>11 Roxane is that its predominant business was</p> <p>12 involved in the generic or multi-source business.</p> <p>13 BY MR. FAUCI:</p> <p>14 Q. When you use the term "multi-source",</p> <p>15 is that -- is that a synonym for generic?</p> <p>16 A. Yes.</p> <p>17 Q. Did Roxane also have a different --</p> <p>18 another type of product known within Roxane as</p> <p>19 branded generic?</p> <p>20 A. Yes, they did.</p> <p>21 MR. GASTWIRTH: Objection to form.</p> <p>22 BY MR. FAUCI:</p>	<p style="text-align: right;">32</p> <p>1 Q. Thank you.</p> <p>2 You said earlier that BIC is something</p> <p>3 like a holding company?</p> <p>4 A. Yes.</p> <p>5 MR. GASTWIRTH: Objection to form.</p> <p>6 BY MR. FAUCI:</p> <p>7 Q. Can you tell me the relationship</p> <p>8 between BIC and BIPI.</p> <p>9 MR. GASTWIRTH: Objection to form.</p> <p>10 THE DEPONENT: Again, BIPI was a</p> <p>11 division of BIC. There were multiple divisions</p> <p>12 within the United States.</p> <p>13 BY MR. FAUCI:</p> <p>14 Q. Do you consider -- Strike that.</p> <p>15 I'm going to show you a document that</p> <p>16 the court reporter has marked as Exhibit 2.</p> <p>17 (Exhibit Berkle 002 was marked.)</p> <p>18 BY MR. FAUCI:</p> <p>19 Q. Do you recognize this document?</p> <p>20 A. Not specifically, no, I do not.</p> <p>21 Q. Please read the -- the top of the</p> <p>22 document I read it says job description; is that</p>
<p style="text-align: right;">31</p> <p>1 Q. Can you tell me what the difference is</p> <p>2 between a multi-source or --</p> <p>3 MR. GASTWIRTH: Just hold on for one</p> <p>4 second.</p> <p>5 MR. FAUCI: Sure.</p> <p>6 MR. GASTWIRTH: Okay. Thanks.</p> <p>7 BY MR. FAUCI:</p> <p>8 Q. Can you tell me the difference between</p> <p>9 a multi-source or generic product and a branded</p> <p>10 generic product.</p> <p>11 A. Again, my understanding is a multi-</p> <p>12 source product is a product in which there are</p> <p>13 several companies marketing the same chemical</p> <p>14 entity with really no differentiation in terms of</p> <p>15 the quality aspects of those drugs.</p> <p>16 Branded generics in my estimation is</p> <p>17 then again not so different in the sense that</p> <p>18 these products are still marketed by multiple</p> <p>19 companies; however, there is a brand name</p> <p>20 attached to that generic drug and there is an</p> <p>21 attempt to try to differentiate those branded</p> <p>22 generics from each other.</p>	<p style="text-align: right;">33</p> <p>1 correct?</p> <p>2 A. Correct.</p> <p>3 MR. GASTWIRTH: And if you need a few</p> <p>4 minutes to look at the document --</p> <p>5 BY MR. FAUCI:</p> <p>6 Q. By all means. Whenever I give you a</p> <p>7 document take a couple minutes to look at it.</p> <p>8 A. Sure. Absolutely.</p> <p>9 Q. So the top of the document says job</p> <p>10 description; that's correct?</p> <p>11 A. Yes.</p> <p>12 Q. Can you read what it says below that.</p> <p>13 Just the next line.</p> <p>14 A. Head of Business Unit Ethical</p> <p>15 Pharmaceuticals United States.</p> <p>16 Q. And then directly below that in</p> <p>17 parentheses.</p> <p>18 A. Executive vice president Boehringer</p> <p>19 Ingelheim Pharmaceuticals, Inc. Vice president</p> <p>20 Boehringer Ingelheim Corp. Corporation, sorry.</p> <p>21 Q. Were these the position or positions</p> <p>22 that you were ultimately hired for in or around</p>

13 (Pages 46 to 49)

<p style="text-align: right;">46</p> <p>1 BY MR. FAUCI:</p> <p>2 Q. Take a moment to familiarize yourself</p> <p>3 with the document. Whenever you're ready, you</p> <p>4 can tell me if you recognize this document.</p> <p>5 A. <b>That's fine.</b></p> <p>6 Q. Do you recognize this document?</p> <p>7 A. <b>Not specific. You know, I can't</b></p> <p>8 <b>remember it specifically.</b></p> <p>9 Q. Do you see in the upper left-hand</p> <p>10 corner it says employee bulletin?</p> <p>11 A. <b>Yes, I do.</b></p> <p>12 Q. Which company issued this employee</p> <p>13 bulletin?</p> <p>14 MR. GASTWIRTH: Objection to form.</p> <p>15 THE DEPONENT: I really don't know.</p> <p>16 BY MR. FAUCI:</p> <p>17 Q. Do you know whether this employee</p> <p>18 bulletin would have been sent to BIPI employees?</p> <p>19 A. <b>I would assume it was.</b></p> <p>20 Q. Do you know whether it would have been</p> <p>21 sent to Roxane employees?</p> <p>22 MR. GASTWIRTH: Objection to form.</p>	<p style="text-align: right;">48</p> <p>1 Q. Including Roxane?</p> <p>2 A. <b>Including Roxane.</b></p> <p>3 Q. Did you report to Mr. Gerstenberg?</p> <p>4 A. <b>Yes, I did.</b></p> <p>5 Q. Was there anyone in between you and Mr.</p> <p>6 Gerstenberg in the hierarchy of the corporation</p> <p>7 or were you pretty much directly reporting to</p> <p>8 him?</p> <p>9 MR. GASTWIRTH: Objection to form.</p> <p>10 THE DEPONENT: I reported directly to</p> <p>11 Mr. Gerstenberg.</p> <p>12 BY MR. FAUCI:</p> <p>13 Q. On the first page in the fourth</p> <p>14 paragraph down, can you just read the first</p> <p>15 sentence into the record.</p> <p>16 A. <b>Starting with Shelly's duties?</b></p> <p>17 Q. Yes. Thank you.</p> <p>18 A. <b>Shelly's duties will mainly focus on</b></p> <p>19 <b>the strategic alignment of our ethical</b></p> <p>20 <b>pharmaceutical business in the U.S. and he will</b></p> <p>21 <b>be responsible for the operating result for this</b></p> <p>22 <b>area.</b></p>
<p style="text-align: right;">47</p> <p>1 THE DEPONENT: It's possible.</p> <p>2 BY MR. FAUCI:</p> <p>3 Q. Do you have any reason to believe it</p> <p>4 wasn't sent to Roxane employees?</p> <p>5 A. <b>I don't know whether it was or wasn't</b></p> <p>6 <b>to be honest with you.</b></p> <p>7 Q. Do you see at the second page that this</p> <p>8 document was signed by--I might mispronounce his</p> <p>9 name--Werner Gerstenberg?</p> <p>10 A. <b>Yes. And that's correct by the way.</b></p> <p>11 Q. Thank you.</p> <p>12 Who is Mr. Gerstenberg?</p> <p>13 A. <b>Mr. Gerstenberg was the CEO of</b></p> <p>14 <b>Boehringer in the United States.</b></p> <p>15 Q. And by Boehringer in the United States,</p> <p>16 do you mean BIPI?</p> <p>17 A. <b>I mean all the divisions. The total</b></p> <p>18 <b>company.</b></p> <p>19 Q. So was he the CEO of BIC?</p> <p>20 A. <b>You know, again, I don't know what the</b></p> <p>21 <b>legal aspects were, but he was basically the</b></p> <p>22 <b>overall country manager for the United States.</b></p>	<p style="text-align: right;">49</p> <p>1 Q. What is the strategic alignment of our</p> <p>2 ethical pharmaceutical business?</p> <p>3 A. <b>Again, I think it is relative to what</b></p> <p>4 <b>we have spoken about before. For those products</b></p> <p>5 <b>being used for the treatment of diseases in human</b></p> <p>6 <b>beings. So for -- again, on the strategic level</b></p> <p>7 <b>for products marketed within BIPI and Roxane</b></p> <p>8 <b>Laboratories.</b></p> <p>9 Q. In the next sentence it states, As in</p> <p>10 other countries business will develop in line</p> <p>11 with the strategy of the strategic business unit</p> <p>12 (SBU) ethical pharmaceuticals BIGmbH. What is</p> <p>13 the strategic business unit ethical</p> <p>14 pharmaceuticals BIGmbH?</p> <p>15 A. <b>Again, on a global basis Boehringer was</b></p> <p>16 <b>organized within a business unit framework. So</b></p> <p>17 <b>as we've talked about a business unit --</b></p> <p>18 <b>strategic business unit in the United States, you</b></p> <p>19 <b>can expand that from various operative units</b></p> <p>20 <b>around the world into the parent company which</b></p> <p>21 <b>had a head of strategic business unit ethical</b></p> <p>22 <b>pharmaceuticals.</b></p>

14 (Pages 50 to 53)

<p style="text-align: right;">50</p> <p>1 Q. If you'd turn to page two.</p> <p>2 A. Yeah.</p> <p>3 Q. The first paragraph. The first</p> <p>4 sentence says, In order to create a unified</p> <p>5 management for our ethical pharmaceutical</p> <p>6 business in the U.S, Edward Tupa, vice president</p> <p>7 sales and marketing, Roxane Laboratories, and</p> <p>8 Fred Duy -- Is that correct?</p> <p>9 A. Correct.</p> <p>10 Q. -- vice president business planning and</p> <p>11 development also of Roxane Laboratories will</p> <p>12 report to Shelly.</p> <p>13 A. Will report functionally to Shelly.</p> <p>14 Q. Will report functionally to Shelly.</p> <p>15 Thank you.</p> <p>16 A. Key word.</p> <p>17 Q. Who is Mr. Tupa?</p> <p>18 A. Mr. Tupa worked within the Roxane</p> <p>19 business entity.</p> <p>20 Q. Do you know what his responsibilities</p> <p>21 were at Roxane?</p> <p>22 A. Responsible as it says here for sales</p>	<p style="text-align: right;">52</p> <p>1 development. So really looking at opportunities</p> <p>2 for new business within the Roxane business</p> <p>3 entity.</p> <p>4 Q. The employee bulletin states that you</p> <p>5 were the executive vice president of BIPI.</p> <p>6 A. Correct.</p> <p>7 Q. And it also says that you were a vice</p> <p>8 president of BIC; is that correct?</p> <p>9 A. Correct.</p> <p>10 Q. How were these -- Were there different</p> <p>11 job responsibilities as executive vice president</p> <p>12 of BIPI and vice president of BIC, or were they</p> <p>13 the same type of responsibilities?</p> <p>14 MR. GASTWIRTH: Objection to form.</p> <p>15 THE DEPONENT: Again, my primary</p> <p>16 responsibility was within BIPI. You know, and</p> <p>17 again, I reemphasize that it was directed towards</p> <p>18 growing the branded business within BIPI.</p> <p>19 BIC really -- I would define it as a</p> <p>20 holding company. And I was an officer within</p> <p>21 BIC, but BIC really didn't have a direct</p> <p>22 business, as we've talked about before.</p>
<p style="text-align: right;">51</p> <p>1 and marketing of Roxane products.</p> <p>2 Q. Would that include multi-source</p> <p>3 products?</p> <p>4 A. Yes.</p> <p>5 Q. Would it include branded generic</p> <p>6 products?</p> <p>7 A. Yes.</p> <p>8 Q. What does it mean that Mr. Tupa</p> <p>9 reported functionally to you?</p> <p>10 A. Basically that means there was a dotted</p> <p>11 line responsibility to me and a direct report and</p> <p>12 responsibility to the president of Roxane</p> <p>13 Laboratories.</p> <p>14 Q. A dotted line responsibility. Can you</p> <p>15 explain what that means.</p> <p>16 A. Again, I go back to what I've said</p> <p>17 before. I really had a strategic involvement</p> <p>18 with Roxane, not an operational day-to-day</p> <p>19 involvement.</p> <p>20 Q. And Fred Duy, can you tell me a little</p> <p>21 bit more about his responsibilities.</p> <p>22 A. Basically, as it says here, business</p>	<p style="text-align: right;">53</p> <p>1 BY MR. FAUCI:</p> <p>2 Q. Were you an officer at any other -- any</p> <p>3 other Boehringer Ingelheim companies besides BIPI</p> <p>4 and BIC?</p> <p>5 MR. GASTWIRTH: Objection to form.</p> <p>6 THE DEPONENT: No.</p> <p>7 BY MR. FAUCI:</p> <p>8 Q. Which company paid your salary?</p> <p>9 A. I believe it was BIPI that paid my</p> <p>10 salary.</p> <p>11 Q. Did you receive a salary from BIC?</p> <p>12 A. No.</p> <p>13 Q. Did you sit on any boards of directors</p> <p>14 for Boehringer Ingelheim companies?</p> <p>15 MR. GASTWIRTH: Objection to form.</p> <p>16 THE DEPONENT: The only board -- The</p> <p>17 only direct position I believe I had was with --</p> <p>18 was with Roxane Laboratories.</p> <p>19 BY MR. FAUCI:</p> <p>20 Q. Do you know approximately how long you</p> <p>21 served on the Roxane board?</p> <p>22 A. Off the top of my head I can't</p>

16 (Pages 58 to 61)

<p style="text-align: right;">58</p> <p>1 A. I -- A slight variation of that. I</p> <p>2 think this refers to the Roxane component of the</p> <p>3 strategic business unit. It doesn't refer to the</p> <p>4 BIPI component, which is purely branded.</p> <p>5 Q. So there was --</p> <p>6 A. Really three.</p> <p>7 Q. I'm sorry. What do you mean by really</p> <p>8 three?</p> <p>9 A. Again, this is -- this refers only to</p> <p>10 Roxane Laboratories.</p> <p>11 Q. Okay.</p> <p>12 A. Okay? That's --</p> <p>13 Q. And so there was a Roxane Laboratories</p> <p>14 component of the business unit?</p> <p>15 A. Yes. According to -- According to this</p> <p>16 anyway definition.</p> <p>17 Q. The third sentence down in the same</p> <p>18 paragraph it says, Sales and marketing for</p> <p>19 branded generics will report to BIPI</p> <p>20 counterparts. Are branded generics, are those</p> <p>21 Roxane products?</p> <p>22 A. Yes, they were.</p>	<p style="text-align: right;">60</p> <p>1 And as I think we talked about</p> <p>2 previously in the document, just slightly above</p> <p>3 that particular line, there's two components of</p> <p>4 the Roxane business, multi-source generic and</p> <p>5 branded generic.</p> <p>6 So for the branded generic products</p> <p>7 there was only a few of them. Those people</p> <p>8 within the Roxane business entity did report</p> <p>9 functionally to designated people within the BIPI</p> <p>10 organization, but the day-to-day operations were</p> <p>11 still conducted by Roxane people.</p> <p>12 Q. Okay. The last sentence of this same</p> <p>13 paragraph reads, The contracting and pricing</p> <p>14 departments will be combined for ROI and BIPI.</p> <p>15 Do you recall if this -- if this happened?</p> <p>16 A. This happened really from the</p> <p>17 administrative perspective, so that there was --</p> <p>18 you know, the actual establishment of pricing or</p> <p>19 contracting was done by individuals within the</p> <p>20 Roxane business entity, but the processing of the</p> <p>21 administration, the submission of prices, were</p> <p>22 done by a central unit within -- within BIPI that</p>
<p style="text-align: right;">59</p> <p>1 Q. Why are Roxane sales and marketing</p> <p>2 reporting to their BIPI counterparts?</p> <p>3 MR. GASTWIRTH: Objection to form.</p> <p>4 That's not what this document says.</p> <p>5 BY MR. FAUCI:</p> <p>6 Q. Well, I can -- Let's just look at the</p> <p>7 sentence. It says, Sales and marketing for</p> <p>8 branded generics will report to BIPI</p> <p>9 counterparts. Can you tell me what -- what you</p> <p>10 think that sentence means?</p> <p>11 A. Well, I can tell you what the situation</p> <p>12 actually was.</p> <p>13 Q. Okay. That's --</p> <p>14 A. Okay. And -- And again, because I</p> <p>15 certainly can't recall having seen this document,</p> <p>16 and I certainly didn't write this document.</p> <p>17 The situation was that there were</p> <p>18 people within the Roxane organization, within the</p> <p>19 Roxane business unit, business entity that had</p> <p>20 responsibility for the day-to-day operations and</p> <p>21 the various functions, including marketing and</p> <p>22 sales.</p>	<p style="text-align: right;">61</p> <p>1 had that responsibility for both BIPI and Roxane.</p> <p>2 Q. Why were they combined in this way?</p> <p>3 A. Again, it was -- it was a synergistic</p> <p>4 decision in the sense of rather than having two</p> <p>5 separate organizations making submissions it made</p> <p>6 sense to -- from an efficiency point of view to</p> <p>7 combine that.</p> <p>8 Q. And submissions to who?</p> <p>9 A. To wherever, you know, pricing or</p> <p>10 contract -- contracts had to be submitted to.</p> <p>11 MR. FAUCI: I think it's a good time</p> <p>12 for a quick break.</p> <p>13 THE DEPONENT: Sure.</p> <p>14 THE VIDEOGRAPHER: It's 9:59. We're</p> <p>15 going off the record.</p> <p>16 (Short break was taken.)</p> <p>17 (Exhibit Berkle 005 was marked.)</p> <p>18 THE VIDEOGRAPHER: It's 10:24. We're</p> <p>19 back on the record.</p> <p>20 BY MR. FAUCI:</p> <p>21 Q. Welcome back, Mr. Berkle.</p> <p>22 A. Thank you.</p>

20 (Pages 74 to 77)

<p style="text-align: right;">74</p> <p>1 MR. GASTWIRTH: I'm -- And just to</p> <p>2 respond to that commentary by counsel, I'm not</p> <p>3 instructing the witness not to answer these</p> <p>4 questions, I'm just objecting to the extent that</p> <p>5 questions are being asked about documents that</p> <p>6 were not provided to the witness about his</p> <p>7 understanding of terms or phrases within</p> <p>8 documents he's never seen before.</p> <p>9 MR. BREEN: You're giving this witness</p> <p>10 the answer. It's improper and I object to it.</p> <p>11 MR. GASTWIRTH: Okay.</p> <p>12 THE DEPONENT: Could you repeat the</p> <p>13 question.</p> <p>14 BY MR. FAUCI:</p> <p>15 Q. Sure. The language I read, the bolded</p> <p>16 language in paragraph three --</p> <p>17 A. Uh-huh. Right.</p> <p>18 Q. -- does that language -- do you</p> <p>19 understand -- can you tell me what you understand</p> <p>20 that language to mean?</p> <p>21 A. Yeah. How do I -- How do I answer</p> <p>22 that? You know, I read it. I under -- you know,</p>	<p style="text-align: right;">76</p> <p>1 made a larger profit margin when he or she</p> <p>2 dispensed a Roxane product?</p> <p>3 MR. GASTWIRTH: Objection to form.</p> <p>4 THE DEPONENT: As I said before, I was</p> <p>5 not involved in the day-to-day operations of</p> <p>6 Roxane or in basically how they set their prices</p> <p>7 in general or how they marketed their generic</p> <p>8 drugs. I really did not get involved. So I am</p> <p>9 not aware whether they did or didn't do the type</p> <p>10 of thing that you said.</p> <p>11 BY MR. FAUCI:</p> <p>12 Q. And I'll ask a similar question. Do</p> <p>13 you recall if Roxane ever promoted the profit</p> <p>14 margin available on its products as a reason for</p> <p>15 a pharmacist to dispense the product?</p> <p>16 MR. GASTWIRTH: Objection.</p> <p>17 THE DEPONENT: I'm not aware of that.</p> <p>18 BY MR. FAUCI:</p> <p>19 Q. Are you familiar with the</p> <p>20 pharmaceutical product known as Ipratropium</p> <p>21 Bromide?</p> <p>22 A. Yes, I am.</p>
<p style="text-align: right;">75</p> <p>1 based on what it says here -- You know, I'm just</p> <p>2 going to repeat what it says. It says that the -</p> <p>3 - a pharmacy is reimbursed by the payer on a</p> <p>4 formula AWP less a defined percentage plus a</p> <p>5 dispensing fee. So ultimately the money that</p> <p>6 goes to the pharmacy.</p> <p>7 Now, other than reading it and taking</p> <p>8 it exactly what it says, I don't know whether</p> <p>9 it's right or wrong or -- you know, I certainly</p> <p>10 don't offer any other opinion beyond what the</p> <p>11 actual words say.</p> <p>12 Q. Did Roxane ever set AWP's for its</p> <p>13 products to ensure that a pharmacist made a</p> <p>14 larger profit margin when he or she dispensed the</p> <p>15 Roxane product?</p> <p>16 MR. GASTWIRTH: Objection. Can I hear</p> <p>17 that question back for a second, please.</p> <p>18 THE COURT REPORTER: Actually, Counsel,</p> <p>19 can you repeat that.</p> <p>20 BY MR. FAUCI:</p> <p>21 Q. Sure. Do you know if Roxane ever set</p> <p>22 AWP's for its products to ensure that a pharmacist</p>	<p style="text-align: right;">77</p> <p>1 Q. What is that?</p> <p>2 A. Ipratropium Bromide is a human</p> <p>3 pharmaceutical product that was originated within</p> <p>4 Boehringer research and marketed as an original</p> <p>5 brand named Atrovent marketed by BIPI in the</p> <p>6 United States. It is used in the treatment of</p> <p>7 chronic obstructive lung disease.</p> <p>8 Q. Is Atrovent a BIPI product?</p> <p>9 A. Yes, it is.</p> <p>10 Q. And is it fair to characterize Atrovent</p> <p>11 as a branded product?</p> <p>12 A. Yes, it is.</p> <p>13 Q. And Ipratropium Bromide, is it fair to</p> <p>14 say that's a generic equivalent of Atrovent?</p> <p>15 A. Yes, it is.</p> <p>16 Q. Were you involved in any way in making</p> <p>17 decisions about the marketing or pricing of</p> <p>18 Ipratropium Bromide?</p> <p>19 MR. GASTWIRTH: Objection to form.</p> <p>20 THE DEPONENT: You're talking about the</p> <p>21 generic version?</p> <p>22 BY MR. FAUCI:</p>



32 (Pages 122 to 125)

<p style="text-align: right;">122</p> <p>1 <b>A. No.</b></p> <p>2 Q. Who -- Have you seen this document?</p> <p>3 <b>A. I can't recall.</b></p> <p>4 Q. Do you have any reason to believe that</p> <p>5 you didn't see it?</p> <p>6 <b>A. I can't answer that yes or no.</b></p> <p>7 Q. Is it -- This is a marketing plan for</p> <p>8 Ipratropium Bromide; is that correct?</p> <p>9 <b>A. It appears to be.</b></p> <p>10 Q. Is it likely you would have been sent a</p> <p>11 copy of a document like that?</p> <p>12 MR. GASTWIRTH: Objection to form.</p> <p>13 THE DEPONENT: It's possible.</p> <p>14 BY MR. FAUCI:</p> <p>15 Q. I'm going to direct your attention to</p> <p>16 page five. It's the internal page numbers.</p> <p>17 There's a bunch of Bates numbers below, but --</p> <p>18 <b>A. Right. Yeah.</b></p> <p>19 Q. It says pricing. Do you see that?</p> <p>20 <b>A. Yes, I do.</b></p> <p>21 Q. Can you read me the first two</p> <p>22 sentences.</p>	<p style="text-align: right;">124</p> <p>1 is to create an attractive spread between WAC and</p> <p>2 AWP encouraging accounts to convert from the</p> <p>3 brand name to the generic product as quickly as</p> <p>4 possible.</p> <p>5 Do you have any reason to dispute that</p> <p>6 the purpose of the pricing structure was as it is</p> <p>7 stated in the marketing plan; i.e., to create an</p> <p>8 attractive spread between the WAC and AWP</p> <p>9 encouraging accounts to convert from the brand</p> <p>10 name to the generic product as quickly as</p> <p>11 possible?</p> <p>12 MR. GASTWIRTH: Objection to form.</p> <p>13 THE DEPONENT: Yeah. The only comment</p> <p>14 I'll make to that is that, you know, certainly my</p> <p>15 understanding was -- on pricing for Roxane was to</p> <p>16 ensure that they were competitive. Beyond that</p> <p>17 I'm not prepared to make any comments.</p> <p>18 BY MR. FAUCI:</p> <p>19 Q. Would you have approved of this plan</p> <p>20 had you seen that the stated reason for the</p> <p>21 pricing structure was to create an attractive</p> <p>22 spread between WAC and AWP?</p>
<p style="text-align: right;">123</p> <p>1 <b>A. Under pricing?</b></p> <p>2 Q. Yes.</p> <p>3 <b>A. Pricing of the IB UDV will need to</b></p> <p>4 <b>follow the traditional parameters of a generic</b></p> <p>5 <b>product. Specifically AWP will be brand less 10</b></p> <p>6 <b>percent or \$44.06 for the 25-count package. WAC</b></p> <p>7 <b>will be AWP less 40 percent or \$26.44 for the 25-</b></p> <p>8 <b>count package.</b></p> <p>9 Q. Is that -- Is it your under -- In your</p> <p>10 understanding is it typical that the AWP for a</p> <p>11 generic product would be AW -- would be brand</p> <p>12 less 10 percent?</p> <p>13 MR. GASTWIRTH: Objection to form.</p> <p>14 THE DEPONENT: Again, my familiarity</p> <p>15 was primarily with the branded products where we</p> <p>16 set a wholesale acquisition cost and that I</p> <p>17 cannot tell you what precisely is common relative</p> <p>18 to AWP which from my perspective was familiar --</p> <p>19 was more associated with generic drugs.</p> <p>20 BY MR. FAUCI:</p> <p>21 Q. The next sentence, The reason this type</p> <p>22 of price structure is used for a generic launch</p>	<p style="text-align: right;">125</p> <p>1 MR. GASTWIRTH: Objection to form.</p> <p>2 THE DEPONENT: I'm not going to</p> <p>3 speculate on that. In general I've said to you</p> <p>4 before that I really did not get involved in the</p> <p>5 details of pricing for the generic products</p> <p>6 within the Roxane line.</p> <p>7 BY MR. FAUCI:</p> <p>8 Q. I think we're going to move on from</p> <p>9 that document.</p> <p>10 <b>A. Okay.</b></p> <p>11 MR. FAUCI: It is 11:57. I'm happy to</p> <p>12 keep going. Lunch isn't here.</p> <p>13 MR. GASTWIRTH: That would be fine.</p> <p>14 MR. FAUCI: Stop whenever people are</p> <p>15 ready.</p> <p>16 BY MR. FAUCI:</p> <p>17 Q. I'm going to show you a document the</p> <p>18 court reporter will mark as Exhibit 15.</p> <p>19 (Exhibit Berkle 015 was marked.)</p> <p>20 BY MR. FAUCI:</p> <p>21 Q. Please take a moment.</p> <p>22 <b>A. Okay.</b></p>

33 (Pages 126 to 129)

<p style="text-align: right;">126</p> <p>1 Q. Have you seen this document?</p> <p>2 A. I don't recall.</p> <p>3 Q. It looks like an early version of an e-</p> <p>4 mail.</p> <p>5 A. You're right.</p> <p>6 Q. It seems to be from Jim King. Regards,</p> <p>7 Jim King. Do you see that at the bottom?</p> <p>8 A. Yes, I do.</p> <p>9 Q. Who's Jim king?</p> <p>10 A. Jim King was vice president of sales</p> <p>11 reporting to me.</p> <p>12 Q. For BIPI?</p> <p>13 A. For BIPI. For BIPI, sorry.</p> <p>14 Q. Did he have responsibility for Roxane</p> <p>15 as well?</p> <p>16 A. No, he did not.</p> <p>17 Q. In the "to" line it's to a bunch of</p> <p>18 different groups it seems; all RDs. What does</p> <p>19 that mean?</p> <p>20 A. Regional directors that would have been</p> <p>21 reporting directly to Jim King.</p> <p>22 Q. Would they be in the trade relations</p>	<p style="text-align: right;">128</p> <p>1 see that?</p> <p>2 A. Yes, I do.</p> <p>3 Q. I'm going to look at the second</p> <p>4 paragraph.</p> <p>5 A. Uh-huh.</p> <p>6 Q. Just so you are clear on sales</p> <p>7 commissions, if Roxane's Ipratropium Bromide is</p> <p>8 sold or if an Atrovent solution is sold, you get</p> <p>9 credit for it. It is in the corporation's best</p> <p>10 interest to shift business to Roxane as quickly</p> <p>11 as possible.</p> <p>12 Did sales personnel -- BIPI sales</p> <p>13 personnel get credit for sales whether or not</p> <p>14 they were BIPI products or Roxane products?</p> <p>15 MR. GASTWIRTH: Objection to form.</p> <p>16 THE DEPONENT: I can only --</p> <p>17 BY MR. FAUCI:</p> <p>18 Q. Go ahead.</p> <p>19 A. I can only say according to this they</p> <p>20 did.</p> <p>21 Q. Do you have any reason to believe they</p> <p>22 didn't?</p>
<p style="text-align: right;">127</p> <p>1 group?</p> <p>2 A. No.</p> <p>3 Q. What -- What group would they be in?</p> <p>4 Where do they fall in the company?</p> <p>5 A. What's called the sales group.</p> <p>6 Basically responsible for medical representatives</p> <p>7 calling on physicians.</p> <p>8 Q. And those people, would they be BIPI</p> <p>9 employees?</p> <p>10 A. Yes, they would.</p> <p>11 Q. And they would be responsible just for</p> <p>12 BIPI products?</p> <p>13 A. Yes.</p> <p>14 Q. What about DMs?</p> <p>15 A. DM stands for direct managers and they</p> <p>16 report to the regional directors.</p> <p>17 Q. And then reps?</p> <p>18 A. Reps are individual sales reps</p> <p>19 reporting to the DMs.</p> <p>20 Q. And all these people are BIPI?</p> <p>21 A. Yes, they are.</p> <p>22 Q. Subject, Atrovent IB solution. Do you</p>	<p style="text-align: right;">129</p> <p>1 A. No, I don't.</p> <p>2 Q. Had you seen this e-mail or known of</p> <p>3 this, would you have approved of BIPI people</p> <p>4 getting credit for Roxane sales?</p> <p>5 A. I would have been aware of it and I</p> <p>6 would have approved it.</p> <p>7 Q. You would have approved it?</p> <p>8 A. Yeah. The reason being is that -- and</p> <p>9 again, I'm making certain assumptions here, that</p> <p>10 this was during only -- this was only for a</p> <p>11 period of time. Okay. And this was the period</p> <p>12 of time when Roxane was preemptively launching</p> <p>13 Ipratropium Bromide.</p> <p>14 Okay. So the agreement was that</p> <p>15 Boehringer medical reps would still be promoting</p> <p>16 the compound to physicians and to hospital</p> <p>17 physicians, therefore, trying to grow the market</p> <p>18 penetration of Ipratropium within the respiratory</p> <p>19 marketplace.</p> <p>20 And because they were putting an effort</p> <p>21 but allowing -- but allowing Roxane to sell a</p> <p>22 generic version during that exclusive period that</p>

47 (Pages 182 to 185)

<p style="text-align: right;">182</p> <p>1 BY MR. FAUCI:</p> <p>2 Q. Who was that? Do you recall who the</p> <p>3 CFO was?</p> <p>4 <b>A. At that -- I don't know what -- What's</b></p> <p>5 <b>the date here?</b></p> <p>6 Q. I think the date is around the 1998</p> <p>7 time frame. Signed 8/25/98.</p> <p>8 <b>A. Probably Holger Huels.</b></p> <p>9 Q. And just for the record it was signed</p> <p>10 by the wholesaler on 8/25/98 and by Roxane Labs</p> <p>11 on 10/28/98.</p> <p>12 <b>A. Gotcha.</b></p> <p>13 Q. Moving on. I'm going to mark as</p> <p>14 Exhibit 26 -- I shouldn't do that, let the court</p> <p>15 reporter do that.</p> <p>16 (Exhibit Berkle 026 was marked.)</p> <p>17 MR. FAUCI: Just so counsel for the</p> <p>18 Defendant knows, this is an amended notice of</p> <p>19 deposition.</p> <p>20 BY MR. FAUCI:</p> <p>21 Q. Have you ever seen this document? Feel</p> <p>22 free to read it.</p>	<p style="text-align: right;">184</p> <p>1 MR. GASTWIRTH: Objection to form.</p> <p>2 THE DEPONENT: The Texas case was after</p> <p>3 I had retired from BIPI.</p> <p>4 BY MR. FAUCI:</p> <p>5 Q. When you left, were you -- That's fine.</p> <p>6 The question is, when you left, did anybody tell</p> <p>7 you that you should look through your documents</p> <p>8 and set aside certain documents?</p> <p>9 <b>A. No.</b></p> <p>10 MR. GASTWIRTH: Objection to form.</p> <p>11 BY MR. FAUCI:</p> <p>12 Q. What number was that, 26?</p> <p>13 <b>A. 26, yeah.</b></p> <p>14 Q. I'm going to show you a document which</p> <p>15 the court reporter will mark as 27.</p> <p>16 (Exhibit Berkle 027 was marked.)</p> <p>17 BY MR. FAUCI:</p> <p>18 Q. Take a moment to familiarize yourself.</p> <p>19 <b>A. Okay.</b></p> <p>20 Q. Turning to the second page.</p> <p>21 <b>A. All right.</b></p> <p>22 Q. Actually just go to the back. There's</p>
<p style="text-align: right;">183</p> <p>1 <b>A. Yes.</b></p> <p>2 Q. When was the first time?</p> <p>3 <b>A. This is the amended copy?</b></p> <p>4 Q. Yes. Although I can represent that the</p> <p>5 only change on that from there to the original is</p> <p>6 the location.</p> <p>7 <b>A. So the original was about a week ago.</b></p> <p>8 Q. Were you asked to look for documents</p> <p>9 prior to this deposition?</p> <p>10 <b>A. Yes, I was.</b></p> <p>11 Q. Did you find any?</p> <p>12 <b>A. No, I did not.</b></p> <p>13 Q. Where did you look?</p> <p>14 <b>A. Where did I look? In my home.</b></p> <p>15 Q. That's good enough.</p> <p>16 <b>A. Yeah.</b></p> <p>17 Q. When you left BIPI in late 2003, were</p> <p>18 you asked to look for documents or search for e-</p> <p>19 mails in connection with the Texas case that</p> <p>20 we've talked about previously or any other case</p> <p>21 involving allegations about average wholesale</p> <p>22 price?</p>	<p style="text-align: right;">185</p> <p>1 two documents here. There's a cover one.</p> <p>2 <b>A. Yes.</b></p> <p>3 Q. I'm going to mostly focus on the second</p> <p>4 part of it. Is it fair to say that you drafted</p> <p>5 pages two through four of this?</p> <p>6 <b>A. I'm sorry?</b></p> <p>7 Q. Is it fair to say that you drafted</p> <p>8 pages two through four of this?</p> <p>9 <b>A. It's got my signature on it so I assume</b></p> <p>10 <b>that's so.</b></p> <p>11 Q. Do you recall drafting this?</p> <p>12 <b>A. Not specifically.</b></p> <p>13 Q. Is this an employee bulletin? Do you</p> <p>14 see that at the top?</p> <p>15 <b>A. Yes.</b></p> <p>16 Q. Who do you -- Who did you understand</p> <p>17 that this employee bulletin would go to?</p> <p>18 <b>A. I would assume that it was directed</b></p> <p>19 <b>towards BIPI and Roxane employees.</b></p> <p>20 Q. I'm going to look at the paragraph</p> <p>21 beginning. As we are all aware. Do you see that?</p> <p>22 <b>A. Yes.</b></p>

48 (Pages 186 to 189)

<p style="text-align: right;">186</p> <p>1 Q. As we are all aware, we have taken</p> <p>2 several steps in the past two years to increase</p> <p>3 the level of business unit collaboration and</p> <p>4 focus across organizations; e.g., business unit</p> <p>5 operating committee, ethical pharmaceutical</p> <p>6 committee.</p> <p>7 Would you agree that -- Is that your</p> <p>8 recollection now that over the past two years</p> <p>9 leading up to 1998 you took several steps to</p> <p>10 increase the level of business unit</p> <p>11 collaboration?</p> <p>12 <b>A. Again, the goal would be to create eff</b></p> <p>13 <b>-- efficiencies and synergies where it made</b></p> <p>14 <b>sense. However, Roxane and BIPI were always</b></p> <p>15 <b>separate entities, they were always separate</b></p> <p>16 <b>management within each entity and the day-to-day</b></p> <p>17 <b>business for each of those entities was done</b></p> <p>18 <b>within that entity.</b></p> <p>19 Q. It says, The changes I will describe in</p> <p>20 this announcement build on this foundation.</p> <p>21 These changes also are designed to build on the</p> <p>22 strengths of Boehringer Ingelheim</p>	<p style="text-align: right;">188</p> <p>1 strengthening the synergy between our solid</p> <p>2 liquid dosage and injectable multi-source</p> <p>3 businesses. Is that what you talked about</p> <p>4 earlier with Ben Venue being an injectable</p> <p>5 company?</p> <p>6 <b>A. Correct. So the solid liquid dose was</b></p> <p>7 <b>-- referred to Roxane and the injectable referred</b></p> <p>8 <b>to Ben Venue.</b></p> <p>9 Q. It says, I've asked Tom Russillo to</p> <p>10 take on this critical and complex challenge.</p> <p>11 Multi-source marketing within RLI, Roxane, now</p> <p>12 will report to Tom. Who's Tom Russillo?</p> <p>13 <b>A. Tom Russillo was president of Ben Venue</b></p> <p>14 <b>Laboratories and obviously with this change took</b></p> <p>15 <b>over responsibility for the multi-source business</b></p> <p>16 <b>within Roxane as well.</b></p> <p>17 Q. Was Tom Russillo at Ben Venue prior to</p> <p>18 its acquisition by the Boehringer Ingelheim</p> <p>19 family?</p> <p>20 <b>A. Yes, he was.</b></p> <p>21 Q. Do you know if Russillo came to work</p> <p>22 for Roxane?</p>
<p style="text-align: right;">187</p> <p>1 Pharmaceuticals, Inc., BIPI, Roxane Laboratories</p> <p>2 and Ben Venue Laboratories while achieving much</p> <p>3 greater synergy across the entire business unit.</p> <p>4 Do you see that?</p> <p>5 <b>A. Yes, I do.</b></p> <p>6 Q. We've talked about synergy a bit</p> <p>7 earlier today. What does it mean to increase the</p> <p>8 synergy across the entire business unit?</p> <p>9 <b>A. Again, to do away with wasted effort in</b></p> <p>10 <b>the sense that you have duplication of -- of</b></p> <p>11 <b>effort in various functions. And where it made</b></p> <p>12 <b>sense to amalgamate services that were common to</b></p> <p>13 <b>the various companies and divisions, then we</b></p> <p>14 <b>attempted to do that. But, again, the day-to-day</b></p> <p>15 <b>operations for each of those businesses was</b></p> <p>16 <b>conducted and carried out by management within</b></p> <p>17 <b>those divisions.</b></p> <p>18 Q. If you look at the next page, the first</p> <p>19 bullet point.</p> <p>20 <b>A. Okay.</b></p> <p>21 Q. We want to expand our important multi-</p> <p>22 source business by capitalizing on and</p>	<p style="text-align: right;">189</p> <p>1 MR. GASTWIRTH: Objection to form.</p> <p>2 THE DEPONENT: I believe he was a Ben</p> <p>3 Venue employee, but you would have to check that</p> <p>4 with people more in the know than I.</p> <p>5 BY MR. FAUCI:</p> <p>6 Q. But it's fair to say regardless of who</p> <p>7 he formally worked for that Roxane employees</p> <p>8 reported to him?</p> <p>9 <b>A. Yes.</b></p> <p>10 Q. I'm going to look down at another</p> <p>11 bullet point. It says, To ensure that we are</p> <p>12 bringing BIPI's medical and drug regulatory</p> <p>13 affairs' knowledge to bear on both our multi-</p> <p>14 source and specialty products, Roxane's, or</p> <p>15 RLI's, medical and drug regulatory affairs'</p> <p>16 current product will report with Doug Wilson's</p> <p>17 BIPI medical/DRA organization. What are the</p> <p>18 medical and drug regulatory affairs departments?</p> <p>19 <b>A. Again, these are the people within that</b></p> <p>20 <b>organization that are responsible for conducting</b></p> <p>21 <b>clinical research and for liaising with the FDA.</b></p> <p>22 Q. It says that RLI's medical and drug</p>

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<p style="text-align: right;">190</p> <p>1 regulatory affairs will report within Doug 2 Wilson's BIPI/DRA organization. Why was that? 3 <b>A. Again, in order to create efficiencies.</b> 4 Q. What type of efficiencies could that 5 create? 6 <b>A. BIPI had a large department, you know,</b> 7 <b>consisting of many more physicians,</b> 8 <b>statisticians, et cetera. So it would allow</b> 9 <b>Roxane -- people responsible for these areas to</b> 10 <b>tap into the larger BIPI medical regulatory</b> 11 <b>organization.</b> 12 Q. Next bullet point it says, RLI branded 13 and specialty products. Are those branded 14 generics? 15 MR. GASTWIRTH: Objection to form. 16 THE DEPONENT: I assume it's branded 17 generics. 18 BY MR. FAUCI: 19 Q. Our RLI branded and specialty products 20 will become an important component of our 21 national and international business strategy. We 22 want to expand our support to these products by</p>	<p style="text-align: right;">192</p> <p>1 <b>able to allow Roxane to benefit from the</b> 2 <b>expertise within BIPI.</b> 3 <b>But, again, I emphasize that the day-</b> 4 <b>to-day operations were conducted for the Roxane</b> 5 <b>branded products -- branded generic products</b> 6 <b>within the Roxane structure.</b> 7 Q. Next bullet point it says, BIPI and RLI 8 contacting will be combined into a single 9 organization. What are BIPI and RLI contracting? 10 I'm on the next page, I'm sorry, the 11 last bullet point. 12 <b>A. Okay. Again, these are the -- this is</b> 13 <b>the department that would set up contracts with</b> 14 <b>purchasing groups or distributors of the BIPI and</b> 15 <b>Roxane products.</b> 16 Q. What do you mean set up contracts? 17 <b>A. Again, if there was a -- a distribution</b> 18 <b>agreement that was negotiated with a purchasing</b> 19 <b>group or a wholesaler or a -- you know, any other</b> 20 <b>distributor, that a contract would be put</b> 21 <b>together representing the terms of the agreement</b> 22 <b>between the two parties.</b></p>
<p style="text-align: right;">191</p> <p>1 increasing the degree of collaboration between 2 the marketing of RLI product lines and BIPI 3 product lines. Do you see that? 4 <b>A. Yes, I do.</b> 5 Q. How would increasing the degree of 6 collaboration between Roxane and BIPI marketing 7 be beneficial? 8 <b>A. Again, this was specific to the branded</b> 9 <b>-- RLI branded products. So at that time BIPI of</b> 10 <b>course had a much greater expertise and</b> 11 <b>experience in marketing these types of products.</b> 12 <b>Keep in mind that Roxane was made up of</b> 13 <b>a couple different types of businesses. The</b> 14 <b>multi-source, which was very -- and then they had</b> 15 <b>these so-called branded generics, which they</b> 16 <b>hoped to market more along the lines of a true</b> 17 <b>original brand such as contained in the BIPI</b> 18 <b>product line.</b> 19 <b>And strategically we made the decision,</b> 20 <b>fine, let's see what we could do and it made</b> 21 <b>sense to combine, you know, at certain levels the</b> 22 <b>reporting relationship to add to be able -- to be</b></p>	<p style="text-align: right;">193</p> <p>1 Q. Next sentence it says, John Powers will 2 lead the day-to-day management of this operation. 3 He did lead the day-to-day management for BIPI 4 and Roxane? 5 MR. GASTWIRTH: Objection to form. 6 THE DEPONENT: You know, I recall that 7 he was predominantly involved on the Roxane's 8 products, but I can't recall specifically beyond 9 that. 10 BY MR. FAUCI: 11 Q. You drafted this document, correct? 12 <b>A. I did. This was also ten years ago.</b> 13 Q. I'm going to ask you to go back to the 14 second page. The first page of this document, 15 second page of the exhibit. 16 <b>A. Right.</b> 17 Q. By the year 2004, very beginning, our 18 ethical pharmaceutical business is expected to 19 generate in the USA more than 40 percent of 20 Boehringer Ingelheim's worldwide ethical 21 pharmaceutical business. I'm just trying to 22 understand what that means. Can you tell me what</p>

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<p style="text-align: right;">226</p> <p>1     <b>A. I believe it was -- The committee was</b>  2     <b>put in place certainly for BIPI products, but I</b>  3     <b>don't want to say that I'm absolutely sure it was</b>  4     <b>for Roxane only because of what I told you</b>  5     <b>previously. I knew that there were discussions</b>  6     <b>taking place to divest of part of the branded</b>  7     <b>generic line and -- relative to Viramune. So I'm</b>  8     <b>not -- my memory fails me. I'm not a hundred</b>  9     <b>percent sure.</b></p> <p>10    Q. You can put that aside now for real.</p> <p>11    <b>A. Okay.</b></p> <p>12    Q. Are you familiar with the  13    pharmaceutical product known as Furosemide?</p> <p>14    <b>A. As an ex-pharmacist, yes.</b></p> <p>15    Q. When were you a pharmacist?</p> <p>16    <b>A. Many years ago. I graduated with a</b>  17    <b>pharmacy degree. I really didn't -- I practiced</b>  18    <b>for an extremely short period of time.</b></p> <p>19    Q. What is Furosemide?</p> <p>20    <b>A. Furosemide is a generic name for a</b>  21    <b>diuretic, a so-called water pill.</b></p> <p>22    Q. Was it a BIPI product?</p>	<p style="text-align: right;">228</p> <p>1     Judy Waterer. It says, Attached is a document  2     called standby statement, Furosemide price  3     change. Do you see that?</p> <p>4     MR. GASTWIRTH: Objection. Form.</p> <p>5     THE DEPONENT: Yes, I do.</p> <p>6     MR. GASTWIRTH: I believe you just  7     switched the from and the to.</p> <p>8     BY MR. FAUCI:</p> <p>9     Q. Fair enough. The document is from Judy  10    Waterer to Lesli Paoletti. I stand corrected.</p> <p>11    It says, Here's a shot at it, please  12    make modifications as you see fit, then pass it  13    by Pam Demala. Who's Pam Demala?</p> <p>14    <b>A. Pam Demala was a BIPI -- either BIPI or</b>  15    <b>BIC employee, I'm not sure, but certainly within</b>  16    <b>the BI side, in the public relations area.</b></p> <p>17    Q. Why would a Furosemide price change be  18    passed by Pam Demala?</p> <p>19    <b>A. I haven't got a clue.</b></p> <p>20    Q. And it says that, You may need to call  21    her and let her know the background, she'll  22    probably want to pass it by Berkle and Russillo</p>
<p style="text-align: right;">227</p> <p>1     <b>A. No, it was not.</b></p> <p>2     Q. Do you know if it was a Roxane product?</p> <p>3     <b>A. I think it was within the Roxane multi-</b>  4     <b>source product line.</b></p> <p>5     Q. It's not a brand of generic, is it?</p> <p>6     <b>A. It is not.</b></p> <p>7     Q. I'm going to hand you Exhibit Number  8     32.</p> <p>9     (Exhibit Berkle 032 was marked.)</p> <p>10    THE DEPONENT: Okay.</p> <p>11    BY MR. FAUCI:</p> <p>12    Q. Are you familiar with this document?</p> <p>13    <b>A. No, I'm not.</b></p> <p>14    Q. Who's Judy Waterer again?</p> <p>15    <b>A. She was a Roxane employee.</b></p> <p>16    Q. Do you know who Lesli Paoletti was?</p> <p>17    <b>A. You know, the name is vaguely familiar,</b>  18    <b>but I couldn't even tell you what position she</b>  19    <b>held. She was a Roxane employee.</b></p> <p>20    Q. She was at Roxane?</p> <p>21    <b>A. Yeah.</b></p> <p>22    Q. It's an e-mail from Lesli Paoletti to</p>	<p style="text-align: right;">229</p> <p>1     as well. Any idea why Ms. Waterer would think  2     that Pam Demala would want to pass it by you?</p> <p>3     <b>A. I don't know. And the only other</b>  4     <b>comment I would make is I'm not sure in the</b>  5     <b>timing but there's somewhere in 2000 that we --</b>  6     <b>we totally changed the structure of the</b>  7     <b>organization and I really was no longer involved</b>  8     <b>in the Roxane business after that point in time.</b>  9     <b>So I don't know whether this coincides with that</b>  10    <b>time period or not.</b></p> <p>11    Q. Do you remember around this time Roxane  12    -- Do you have any knowledge about the fact that  13    around this time Roxane raised the AWP's for its  14    Furosemide products?</p> <p>15    MR. GASTWIRTH: Objection. Form. I'm  16    sorry. Can I hear that back, please.</p> <p>17    (Record was read by the court  18    reporter.)</p> <p>19    MR. FAUCI: I can read it again if  20    you'd like.</p> <p>21    MR. GASTWIRTH: Thanks.</p> <p>22    BY MR. FAUCI:</p>



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<p style="text-align: right;">230</p> <p>1 Q. Do you have any recollection whether</p> <p>2 around the 2000 time frame Roxane raised the AWP</p> <p>3 for its Furosemide products?</p> <p>4 <b>A. I'm not aware.</b></p> <p>5 Q. We can move on from that document.</p> <p>6 Can we go off the record for two</p> <p>7 minutes.</p> <p>8 THE VIDEOGRAPHER: It's 3:14. We're</p> <p>9 going off the record.</p> <p>10 (Short break was taken.)</p> <p>11 (Exhibit Berkle 033 was marked.)</p> <p>12 THE VIDEOGRAPHER: It's 3:28. We're</p> <p>13 going back on the record.</p> <p>14 BY MR. FAUCI:</p> <p>15 Q. Mr. Berkle, I've handed you what's been</p> <p>16 marked as Exhibit 33.</p> <p>17 <b>A. Yes.</b></p> <p>18 Q. Can you take a moment to familiarize</p> <p>19 yourself with it.</p> <p>20 <b>A. Okay.</b></p> <p>21 Q. What's the subject line of this e-mail?</p> <p>22 <b>A. It says Furosemide tablet AWP</b></p>	<p style="text-align: right;">232</p> <p>1 <b>A. Fred was a Roxane employee.</b></p> <p>2 Q. And it's sent to you, Shelly Berkle?</p> <p>3 <b>A. Yes, it is.</b></p> <p>4 Q. Subject, Roxicodone 15/30mg launch</p> <p>5 plan. Do you see that?</p> <p>6 <b>A. Yes, I do.</b></p> <p>7 Q. And then does the attachment to this e-</p> <p>8 mail appear to be a launch plan for Roxicodone?</p> <p>9 <b>A. It certainly appears to be at least a</b></p> <p>10 <b>summary of a launch plan. Highlights.</b></p> <p>11 Q. Is Roxicodone a Roxane product?</p> <p>12 <b>A. Yes, it was.</b></p> <p>13 Q. Second sentence of the e-mail, The</p> <p>14 strategy is essentially what you saw in</p> <p>15 Tarrytown. What's Tarrytown?</p> <p>16 <b>A. It's -- Tarrytown is a town in New York</b></p> <p>17 <b>State close -- just across the border from</b></p> <p>18 <b>Connecticut.</b></p> <p>19 Q. What brought you to Tarrytown?</p> <p>20 <b>A. I'm sorry?</b></p> <p>21 Q. What brought you to Tarrytown?</p> <p>22 <b>A. Well, there's a conference that was</b></p>
<p style="text-align: right;">231</p> <p>1 <b>adjustment.</b></p> <p>2 Q. Have you read or seen this before?</p> <p>3 <b>A. No, I have not.</b></p> <p>4 Q. That's all. We're going to do another</p> <p>5 document.</p> <p>6 (Exhibit Berkle 034 was marked.)</p> <p>7 BY MR. FAUCI:</p> <p>8 Q. The court reporter has handed you</p> <p>9 what's been marked as Exhibit 34. It's a very</p> <p>10 lengthy document. Feel free to read it, but I'm</p> <p>11 going to direct your attention to specific parts</p> <p>12 of it, so just tell me when you feel ready to</p> <p>13 have some questions -- have some questions asked.</p> <p>14 MR. BREEN: Did you already mark this</p> <p>15 one?</p> <p>16 MR. FAUCI: Yep. 34.</p> <p>17 THE DEPONENT: Okay.</p> <p>18 BY MR. FAUCI:</p> <p>19 Q. Do you recognize this document?</p> <p>20 <b>A. Not specifically.</b></p> <p>21 Q. Look at the first page. It appears to</p> <p>22 be an e-mail from Fred Duy. Who's he?</p>	<p style="text-align: right;">233</p> <p>1 <b>utilized frequently for meetings by -- by the</b></p> <p>2 <b>BIPI people, BIPI/Roxane people.</b></p> <p>3 Q. Do you recall -- The strategy is</p> <p>4 essentially what you saw in Tarrytown. Do you</p> <p>5 recall being exposed to strategies relating to a</p> <p>6 launch document in Tarrytown?</p> <p>7 <b>A. I can't -- I can't remember</b></p> <p>8 <b>specifically that meeting. You know, certainly I</b></p> <p>9 <b>was at multiple meetings over the years in</b></p> <p>10 <b>Tarrytown, but I can't remember the details.</b></p> <p>11 Q. It goes on to say that, It--I think the</p> <p>12 strategy--has been updated and expanded with</p> <p>13 specific tactics by Doug Bierl with input from</p> <p>14 lots of people here and in Ridgefield. Who's</p> <p>15 Doug Bierl?</p> <p>16 <b>A. I haven't got a clue.</b></p> <p>17 Q. What's Ridgefield?</p> <p>18 <b>A. Ridgefield is the town -- location of</b></p> <p>19 <b>BI Pharmaceuticals.</b></p> <p>20 Q. Where was Roxane?</p> <p>21 <b>A. In Columbus, Ohio.</b></p> <p>22 Q. Ridgefield means BIPI?</p>

79 (Pages 310 to 313)

<p style="text-align: right;">310</p> <p>1     <b>A. Again, as I testified earlier during</b>  2     <b>the day, on a strategic level, but I was not</b>  3     <b>involved on the -- in the day-to-day operations</b>  4     <b>and certainly not involved in the pricing</b>  5     <b>decisions in general.</b>  6     Q. Do you still have your exhibits handy?  7     <b>A. They're on the floor next to me.</b>  8     Q. Okay. May I ask you just to put them  9     up on the table. I'm going to refer to a few of  10    them now.  11    <b>A. Sure.</b>  12    Q. If I can draw your attention to Exhibit  13    35, please.  14    <b>A. Okay.</b>  15    Q. Is Exhibit 35 a memorandum with the  16    subject heading recommended pricing Roxicodone?  17    <b>A. Yes.</b>  18    Q. And it's dated August 22nd, 2000?  19    <b>A. Yes.</b>  20    Q. Do you recall that Mr. Fauci asked you  21    some questions about this document?  22    <b>A. Yes, I do.</b></p>	<p style="text-align: right;">312</p> <p>1     <b>where I was not involved in pricing for multi-</b>  2     <b>source products in general.</b>  3     Q. Can I direct your attention to the  4     document that's been marked Exhibit 31, please.  5     <b>A. Okay. Got it.</b>  6     Q. This document is an e-mail dated May  7     3rd, 2001 from Dan Gerrity, correct?  8     <b>A. Correct.</b>  9     Q. And it says, Please review the attached  10    draft pricing policy?  11    <b>A. Yes.</b>  12    Q. And behind it -- behind the first page  13    there beginning on page D0120629 there appears to  14    be a pricing policy and procedure memorandum.  15    <b>A. Yes, I see that.</b>  16    Q. Do you know if this pricing policy and  17    procedure memorandum was actually ever finalized?  18    <b>A. I can't recall whether it was finalized</b>  19    <b>in this -- precisely the same way as it is laid</b>  20    <b>out here. There was a procedure put in place,</b>  21    <b>but I certainly don't recall whether it was</b>  22    <b>exactly the same as -- as outlined.</b></p>
<p style="text-align: right;">311</p> <p>1     Q. Do you see that there's some signature  2     blocks on the bottom of this first page?  3     <b>A. Yes, I do.</b>  4     Q. Can you please tell me who those  5     signature blocks appear to be for.  6     <b>A. One is for myself and one is for my</b>  7     <b>immediate boss Werner Gerstenberg.</b>  8     Q. Does the signature actually appear  9     under your name with respect to this recommended  10    pricing for Roxicodone document?  11    <b>A. No, it does not.</b>  12    Q. Earlier this afternoon you testified  13    that your focus would have been on WAC in  14    connection with your involvement at BIPI,  15    correct?  16        MR. FAUCI: Objection. Form.  17        THE DEPONENT: Yes.  18    BY MR. GASTWIRTH:  19    Q. Would you have ever been focused on WAC  20    with respect to Roxane's multi-source business?  21    <b>A. No. I just reiterate what my question</b>  22    <b>was -- my answer was on the previous question</b></p>	<p style="text-align: right;">313</p> <p>1     Q. And does this pricing -- this draft  2     pricing policy and procedure memorandum, does it  3     relate to only brand products for Boehringer  4     Ingelheim Pharmaceuticals, Inc., BIPI and Roxane?  5        MR. FAUCI: Objection. Form.  6        THE DEPONENT: I believe that's true.  7        MR. BREEN: Also objection leading.  8    BY MR. GASTWIRTH:  9    Q. I'd like to direct your attention to  10    Exhibit 27, please.  11    <b>A. Yeah, I have it.</b>  12    Q. Okay. The last page of Exhibit 27,  13    please.  14    <b>A. Okay.</b>  15    Q. Do you recall that Mr. Fauci earlier  16    today directed you to -- your attention to the  17    bullet point that begins BIPI -- about three  18    paragraphs down, BIPI and RLI contracting will be  19    combined into a single organization?  20    <b>A. Yes, I see that.</b>  21    Q. During the time period when you were  22    employed by BIPI, did BIPI always enter into</p>



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<p style="text-align: right;">314</p> <p>1 separate contracts with its customers?</p> <p>2 MR. FAUCI: Objection. Form.</p> <p>3 THE DEPONENT: Yes.</p> <p>4 BY MR. GASTWIRTH:</p> <p>5 Q. Are you aware of whether Roxane entered</p> <p>6 into separate contracts with its customers during</p> <p>7 the time period that you were employed by BIPI?</p> <p>8 <b>A. I believe so.</b></p> <p>9 Q. Mr. Fauci asked you a few questions</p> <p>10 about documents that you produced in connection</p> <p>11 with this litigation. Do you remember those?</p> <p>12 MR. FAUCI: Objection. Form.</p> <p>13 THE DEPONENT: I remember generally</p> <p>14 some question relative to that.</p> <p>15 BY MR. GASTWIRTH:</p> <p>16 Q. And do you recall that Mr. Fauci asked</p> <p>17 you that when you left BIPI did anyone ask you to</p> <p>18 look for any documents?</p> <p>19 <b>A. Again, I don't remember the specific</b></p> <p>20 <b>question.</b></p> <p>21 Q. But you remember that kind of line of</p> <p>22 inquiry?</p>	<p style="text-align: right;">316</p> <p>1 Exhibit 16.</p> <p>2 <b>A. The one that says "In order to solve"?</b></p> <p>3 Q. Yes. Can you read that first line,</p> <p>4 please.</p> <p>5 <b>A. In order to solve this unique</b></p> <p>6 <b>situation, starting today BIPI will be billed --</b></p> <p>7 <b>filling selected contracted Roxane Ipratropium</b></p> <p>8 <b>Bromide orders for a set period of time not to</b></p> <p>9 <b>exceed the end of 1996 or 300,000 units, bracket</b></p> <p>10 <b>boxes of 25, bracket.</b></p> <p>11 Q. Do you believe that the substitution of</p> <p>12 Atrovent for Ipratropium Bromide was a unique</p> <p>13 situation?</p> <p>14 MR. FAUCI: Objection. Form.</p> <p>15 THE DEPONENT: Yeah. I would say</p> <p>16 absolutely it was unique. It was a one-off</p> <p>17 situation.</p> <p>18 BY MR. GASTWIRTH:</p> <p>19 Q. So you're not -- do you recall any</p> <p>20 other instances when -- when BIPI drugs were</p> <p>21 substituted for Roxane drugs?</p> <p>22 <b>A. No, I do not.</b></p>
<p style="text-align: right;">315</p> <p>1 <b>A. Yes.</b></p> <p>2 Q. Did you ever -- Did you leave your</p> <p>3 documents at BIPI when you left the BIPI</p> <p>4 organization?</p> <p>5 MR. FAUCI: Objection. Form.</p> <p>6 THE DEPONENT: All my -- whatever</p> <p>7 documents were in my possession I left at the</p> <p>8 Boehringer offices.</p> <p>9 BY MR. GASTWIRTH:</p> <p>10 Q. Okay. And you understand that</p> <p>11 documents have been produced in connection with</p> <p>12 this litigation?</p> <p>13 <b>A. Yes.</b></p> <p>14 Q. May I direct your attention to Exhibit</p> <p>15 16, please.</p> <p>16 <b>A. I have it.</b></p> <p>17 Q. Do you recall a line of inquiry by Mr.</p> <p>18 Fauci concerning some substitution of Atrovent</p> <p>19 for some Ipratropium Bromide sales?</p> <p>20 <b>A. Yes.</b></p> <p>21 Q. Can I direct your attention to the</p> <p>22 third paragraph, please, of this document,</p>	<p style="text-align: right;">317</p> <p>1 Q. As executive vice president for BIPI</p> <p>2 would it have been important for you to</p> <p>3 understand the release of the generic Ipratropium</p> <p>4 Bromide product by Roxane?</p> <p>5 <b>A. Yes. Absolutely.</b></p> <p>6 Q. Why?</p> <p>7 <b>A. Again, BIPI marketed the Atrovent</b></p> <p>8 <b>brand. It was an important revenue driver. BIPI</b></p> <p>9 <b>was aware that the patent would be ending --</b></p> <p>10 <b>exclusivity would be ending at a specific period</b></p> <p>11 <b>of time. Also Roxane being a sister company we</b></p> <p>12 <b>believed that by working together we could</b></p> <p>13 <b>benefit the overall BI U.S. family of companies</b></p> <p>14 <b>in the long term if we could work together.</b></p> <p>15 Q. As executive VP for BIPI did you have</p> <p>16 any involvement in the setting of prices for the</p> <p>17 Ipratropium Bromide, the generic?</p> <p>18 <b>A. The generic? No, I didn't.</b></p> <p>19 <b>Can I qualify that I was aware, you</b></p> <p>20 <b>know, of the price that was ultimately set for</b></p> <p>21 <b>that because of the joint interest of both</b></p> <p>22 <b>parties.</b></p>

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<p style="text-align: right;">318</p> <p>1 Q. Did you ever tell Roxane what the</p> <p>2 prices should be for Ipratropium Bromide though</p> <p>3 as executive VP of BIPI?</p> <p>4 <b>A. No, I didn't.</b></p> <p>5 Q. At the very beginning of today you</p> <p>6 described BIPI and Roxane as being two separate</p> <p>7 businesses in 1994.</p> <p>8 <b>A. That's correct.</b></p> <p>9 Q. During your entire tenure at BIPI, so</p> <p>10 from 1994 to 2003, do you believe that Roxane and</p> <p>11 BIPI remained two separate businesses?</p> <p>12 MR. FAUCI: Objection. Form.</p> <p>13 MR. BREEN: Objection. Form.</p> <p>14 THE DEPONENT: Yes, I do.</p> <p>15 BY MR. GASTWIRTH:</p> <p>16 Q. Do you believe that BIPI and Roxane</p> <p>17 were two separate businesses from the time period</p> <p>18 1994 until 2003?</p> <p>19 MR. BREEN: Objection. Form.</p> <p>20 MR. FAUCI: Objection. Form.</p> <p>21 THE DEPONENT: Yes, I do.</p> <p>22 BY MR. GASTWIRTH:</p>	<p style="text-align: right;">320</p> <p>1 employees?</p> <p>2 <b>A. Yes, they did.</b></p> <p>3 MR. FAUCI: Objection. Form.</p> <p>4 BY MR. GASTWIRTH:</p> <p>5 Q. Did Roxane and BIPI have separate</p> <p>6 payrolls?</p> <p>7 MR. BREEN: Objection.</p> <p>8 MR. FAUCI: Objection. Form.</p> <p>9 THE DEPONENT: I believe so. As far as</p> <p>10 I know.</p> <p>11 BY MR. GASTWIRTH:</p> <p>12 Q. Did BIPI and Roxane sell different</p> <p>13 drugs?</p> <p>14 MR. FAUCI: Objection. Form.</p> <p>15 THE DEPONENT: Yes.</p> <p>16 BY MR. GASTWIRTH:</p> <p>17 Q. Did BIPI sell different drugs from</p> <p>18 Roxane?</p> <p>19 <b>A. Yes. Again, just going back to the</b></p> <p>20 <b>previous question, other than, you know, when you</b></p> <p>21 <b>mean drug, Ipratropium obviously was a similar</b></p> <p>22 <b>chemical entity.</b></p>
<p style="text-align: right;">319</p> <p>1 Q. Mr. Berkle, during your tenure at BIPI</p> <p>2 did you view Roxane, BIPI and BIC as separate</p> <p>3 independent companies?</p> <p>4 MR. FAUCI: Objection. Form.</p> <p>5 THE DEPONENT: Yes, I did.</p> <p>6 BY MR. GASTWIRTH:</p> <p>7 Q. Did you treat -- During your tenure at</p> <p>8 BIPI did you treat Roxane, BIPI and BIC as</p> <p>9 separate independent companies?</p> <p>10 <b>A. Yes.</b></p> <p>11 Q. Did Roxane have separate offices from</p> <p>12 BIPI?</p> <p>13 <b>A. Yes.</b></p> <p>14 Q. Where were Roxane's offices located?</p> <p>15 <b>A. Columbus, Ohio.</b></p> <p>16 Q. Where were BIPI's offices located?</p> <p>17 <b>A. Ridgefield, Connecticut.</b></p> <p>18 Q. Did BIC have separate offices from both</p> <p>19 BIPI and Roxane?</p> <p>20 <b>A. BIC was situated at Ridgefield,</b></p> <p>21 <b>Connecticut.</b></p> <p>22 Q. Did Roxane and BIPI have their own</p>	<p style="text-align: right;">321</p> <p>1 Q. But there was a separate Ipratropium</p> <p>2 Bromide generic in Atrovent which was a brand of</p> <p>3 generic, correct?</p> <p>4 <b>A. There was a differentiation based on</b></p> <p>5 <b>label.</b></p> <p>6 Q. Can you please explain the</p> <p>7 differentiation -- Strike that.</p> <p>8 How were the drugs that were sold by</p> <p>9 Roxane and BIPI different during the time period</p> <p>10 that you were employed at BIPI?</p> <p>11 <b>A. BIPI sold unique original -- original</b></p> <p>12 <b>researched compounds and one -- one-unique, one-</b></p> <p>13 <b>only type drugs. And Roxane sold predominantly</b></p> <p>14 <b>products that were multi-source, meaning that</b></p> <p>15 <b>they were multiple competitors of the same</b></p> <p>16 <b>chemical entity on the marketplace.</b></p> <p>17 Q. Do you believe that the prices are set</p> <p>18 differently for branded drugs as compared to</p> <p>19 generic drugs?</p> <p>20 MR. FAUCI: Objection. Form.</p> <p>21 THE DEPONENT: I believe so.</p> <p>22 BY MR. GASTWIRTH:</p>

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<p style="text-align: right;">322</p> <p>1 Q. Did Roxane have different customers to</p> <p>2 your knowledge as compared to BIPI?</p> <p>3 MR. FAUCI: Objection. Form.</p> <p>4 THE DEPONENT: Yes, they did have</p> <p>5 different customers.</p> <p>6 BY MR. GASTWIRTH:</p> <p>7 Q. How so?</p> <p>8 A. They probably had a broader breadth of</p> <p>9 customers as opposed to BIPI. BIPI sold</p> <p>10 predominantly through wholesalers only, and</p> <p>11 Roxane because of the nature of their business,</p> <p>12 generic business, certainly sold through</p> <p>13 wholesalers but other types of distributors as</p> <p>14 well. Although, again, for a period of time that</p> <p>15 I can recall a good bulk of the business for</p> <p>16 Roxane was directed through wholesales.</p> <p>17 Q. Did BIPI have financial statements?</p> <p>18 A. Yes, they did.</p> <p>19 Q. Was BIPI's financial statements</p> <p>20 separate from Roxane?</p> <p>21 A. Yes, they were.</p> <p>22 Q. Did BIPI have business plans?</p>	<p style="text-align: right;">324</p> <p>1 BY MR. GASTWIRTH:</p> <p>2 Q. Did Roxane and BIPI have their own</p> <p>3 marketing departments?</p> <p>4 A. Yes.</p> <p>5 MR. FAUCI: Objection. Form.</p> <p>6 BY MR. GASTWIRTH:</p> <p>7 Q. Did Roxane and BIPI have their own</p> <p>8 contract departments?</p> <p>9 A. Yes.</p> <p>10 Q. Mr. Berkle, during your tenure at BIPI</p> <p>11 did you ever have any day-to-day operational</p> <p>12 responsibility for Roxane's generic business?</p> <p>13 A. No, I didn't.</p> <p>14 MR. FAUCI: Objection. Form.</p> <p>15 BY MR. GASTWIRTH:</p> <p>16 Q. I'm sorry. Can you repeat your answer,</p> <p>17 please.</p> <p>18 A. No, I did not.</p> <p>19 Q. Mr. Berkle, in your position as VP of</p> <p>20 BIC, did you ever have any day-to-day operational</p> <p>21 responsibility for Roxane's generic business?</p> <p>22 A. No, I did not.</p>
<p style="text-align: right;">323</p> <p>1 A. Yes, they did.</p> <p>2 Q. Do you know if Roxane had business</p> <p>3 plans?</p> <p>4 A. Yes, they did.</p> <p>5 Q. Would BIPI's business plans have been</p> <p>6 different than Roxane's business plans?</p> <p>7 A. Yes.</p> <p>8 MR. FAUCI: Objection. Form.</p> <p>9 BY MR. GASTWIRTH:</p> <p>10 Q. Did BIPI have growth forecasts?</p> <p>11 A. Yes.</p> <p>12 Q. Did Roxane have growth forecasts?</p> <p>13 A. Yes.</p> <p>14 Q. Would BIPI's growth forecast have been</p> <p>15 different than Roxane's forecast?</p> <p>16 MR. FAUCI: Objection. Form.</p> <p>17 THE DEPONENT: Yes.</p> <p>18 BY MR. GASTWIRTH:</p> <p>19 Q. Did Roxane and BIPI have their own</p> <p>20 sales forces?</p> <p>21 MR. BREEN: Objection. Form.</p> <p>22 THE DEPONENT: Yes.</p>	<p style="text-align: right;">325</p> <p>1 Q. Mr. Berkle, do you believe that BIC had</p> <p>2 any day-to-day operational responsibility over</p> <p>3 Roxane's business?</p> <p>4 A. No, I do not.</p> <p>5 Q. Mr. Berkle, do you believe that the</p> <p>6 German parent of Boehringer had any day-to-day</p> <p>7 operational responsibility over BIPI's business?</p> <p>8 A. No, I do not.</p> <p>9 Q. Mr. Berkle, do you believe that the</p> <p>10 German parent of Boehringer had any day-to-day</p> <p>11 operational responsibility over Roxane?</p> <p>12 A. No, I do not.</p> <p>13 Q. Mr. Berkle, did BIPI have a board of</p> <p>14 directors?</p> <p>15 A. Yes, it did.</p> <p>16 Q. Did Roxane have a board of directors?</p> <p>17 A. Yes, it did.</p> <p>18 Q. Were they separate board of directors?</p> <p>19 That is, the board of directors for Roxane was</p> <p>20 separate from the board of directors of BIPI?</p> <p>21 MR. FAUCI: Objection. Form.</p> <p>22 THE DEPONENT: Yes, it was.</p>

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<p style="text-align: right;">326</p> <p>1 BY MR. GASTWIRTH:</p> <p>2 Q. And the board of directors for BIPI had</p> <p>3 meetings?</p> <p>4 <b>A. I believe --</b></p> <p>5 MR. FAUCI: Objection. Form.</p> <p>6 THE DEPONENT: I believe it did.</p> <p>7 BY MR. GASTWIRTH:</p> <p>8 Q. And did the board of directors for</p> <p>9 Roxane have meetings?</p> <p>10 <b>A. I believe it did.</b></p> <p>11 Q. Would the board of directors' meetings</p> <p>12 for Roxane and BIPI have occurred at different</p> <p>13 times?</p> <p>14 <b>A. I believe that's true.</b></p> <p>15 Q. Roxane had some officers, correct?</p> <p>16 <b>A. Yes.</b></p> <p>17 Q. Roxane had executives?</p> <p>18 <b>A. Yes.</b></p> <p>19 Q. And BIPI had officers?</p> <p>20 <b>A. Yes.</b></p> <p>21 Q. And BIPI had executives?</p> <p>22 <b>A. Yes.</b></p>	<p style="text-align: right;">328</p> <p>1 that involved what counsel said, but stop before</p> <p>2 you answer and let counsel have an chance to</p> <p>3 object because he may have some attorney-client</p> <p>4 privilege objections.</p> <p>5 And -- And after I finished my</p> <p>6 examination today, a few minutes ago, you did</p> <p>7 have an opportunity to consult with counsel,</p> <p>8 correct?</p> <p>9 <b>A. Yes.</b></p> <p>10 Q. Okay. And so first question, with</p> <p>11 respect to the -- your testimony that you believe</p> <p>12 Roxane had a board of directors, without going</p> <p>13 into any discussions with counsel, can you tell</p> <p>14 me who was on that board?</p> <p>15 <b>A. I'll go back to I think I responded</b></p> <p>16 <b>earlier this morning that certainly Mr.</b></p> <p>17 <b>Gerstenberg was on that board, I was on that</b></p> <p>18 <b>board. But beyond that, I really don't recall.</b></p> <p>19 Q. So you and Gerstenberg were on the</p> <p>20 Roxane board?</p> <p>21 <b>A. Correct.</b></p> <p>22 Q. And when did you have your last board</p>
<p style="text-align: right;">327</p> <p>1 Q. And BIC had a board of directors,</p> <p>2 correct?</p> <p>3 MR. FAUCI: Objection. Form.</p> <p>4 THE DEPONENT: That's correct.</p> <p>5 BY MR. GASTWIRTH:</p> <p>6 Q. Mr. Berkle, who was the head of Roxane</p> <p>7 during your employment at BIPI?</p> <p>8 <b>A. That differed at different time</b></p> <p>9 <b>periods. Certainly when I first came to the U.S.</b></p> <p>10 <b>it was Jerry Wojta who was the president. There</b></p> <p>11 <b>was a period of time that Ed Tupa was the senior</b></p> <p>12 <b>manager at -- at Roxane. And then certainly Tom</b></p> <p>13 <b>Russillo was the -- was the head of Roxane</b></p> <p>14 <b>Laboratories.</b></p> <p>15 MR. GASTWIRTH: Just take a moment.</p> <p>16 I have no further questions.</p> <p>17 MR. BREEN: Just a few follow-up based</p> <p>18 upon that.</p> <p>19</p> <p>20 EXAMINATION</p> <p>21 BY MR. BREEN:</p> <p>22 Q. I'm going to ask a couple questions</p>	<p style="text-align: right;">329</p> <p>1 meeting for Roxane?</p> <p>2 <b>A. I have no idea.</b></p> <p>3 Q. Do you have a present recollection of</p> <p>4 sitting in a board meeting for Roxane</p> <p>5 Laboratories?</p> <p>6 <b>A. Very vague.</b></p> <p>7 Q. How many times did you have board</p> <p>8 meetings for Roxane Laboratories?</p> <p>9 <b>A. Again, I was trying to think, and I</b></p> <p>10 <b>don't recall the frequency of meetings.</b></p> <p>11 Q. How long were you on the board for</p> <p>12 Roxane Laboratories?</p> <p>13 <b>A. Again, I don't know the number of</b></p> <p>14 <b>years.</b></p> <p>15 Q. Was it one year?</p> <p>16 <b>A. It was beyond one year, but I -- I just</b></p> <p>17 <b>don't know.</b></p> <p>18 Q. Was it the entire tenure that you were</p> <p>19 with the company?</p> <p>20 <b>A. I don't believe so.</b></p> <p>21 Q. Where did you have the board meetings</p> <p>22 at?</p>

<p style="text-align: right;">354</p> <p>1 directors for Roxane is identified?</p> <p>2 MS. ROGERS: Objection. Form.</p> <p>3 THE DEPONENT: Yes, it does.</p> <p>4 BY MR. GASTWIRTH:</p> <p>5 Q. And what is the date of this corporate</p> <p>6 data sheet?</p> <p>7 A. 6/21/99.</p> <p>8 Q. Does this corporate data sheet identify</p> <p>9 the board of directors for Roxane as of 6/21/99?</p> <p>10 A. It appears to.</p> <p>11 Q. And who were the corporate directors as</p> <p>12 of 6/21/99 for Roxane?</p> <p>13 A. Mr. Gerstenberg, Mr. Poerschmann and</p> <p>14 myself.</p> <p>15 Q. Okay. Now, Mr. Breen also suggested</p> <p>16 that BIPI's board did not have annual meetings.</p> <p>17 And --</p> <p>18 MR. FAUCI: Objection. Form.</p> <p>19 BY MR. GASTWIRTH:</p> <p>20 Q. -- I don't have all --</p> <p>21 MR. BREEN: Objection. Form. You miss</p> <p>22 -- Counsel, you mischaracterized what I said. I</p>	<p style="text-align: right;">356</p> <p>1 it's true based on this document.</p> <p>2 BY MR. GASTWIRTH:</p> <p>3 Q. And does this document also have a</p> <p>4 resolution for adoption of appointment of</p> <p>5 officers?</p> <p>6 A. It does.</p> <p>7 Q. And were officers adopted at this</p> <p>8 annual meeting for the board of directors for</p> <p>9 BIPI?</p> <p>10 MR. FAUCI: Objection. Form.</p> <p>11 THE DEPONENT: Yes, they were.</p> <p>12 BY MR. GASTWIRTH:</p> <p>13 Q. And were you one of the officers that</p> <p>14 was -- that was appointed at this annual meeting</p> <p>15 that occurred on June 24, 2003 for BIPI?</p> <p>16 A. Yes, I was.</p> <p>17 Q. Does this document refresh your</p> <p>18 recollection as to whether BIPI had annual</p> <p>19 meetings of board of directors?</p> <p>20 MR. BREEN: Objection. Form.</p> <p>21 MR. FAUCI: Objection. Form.</p> <p>22 THE DEPONENT: Certainly I knew there</p>
<p style="text-align: right;">355</p> <p>1 asked this witness questions to test his</p> <p>2 knowledge based upon testimony that you elicited,</p> <p>3 Counsel. So please stop mischaracterizing</p> <p>4 anything I said. You asked the man questions, he</p> <p>5 gave you answers, I tested his knowledge. That's</p> <p>6 it.</p> <p>7 MR. GASTWIRTH: What exhibit are we on?</p> <p>8 42? If you can mark that Exhibit 42, please.</p> <p>9 (Exhibit Berkle 042 was marked.)</p> <p>10 MR. FAUCI: Do you have a copy of it?</p> <p>11 MR. GASTWIRTH: I'm going to give it to</p> <p>12 you in one second.</p> <p>13 BY MR. GASTWIRTH:</p> <p>14 Q. Exhibit 42 states BIPI annual meeting</p> <p>15 of the board of directors June 24th, 2003,</p> <p>16 correct?</p> <p>17 A. Correct.</p> <p>18 Q. Based on this document, do you believe</p> <p>19 that there was an annual meeting of the board of</p> <p>20 directors for BIPI on June 24th, 2003?</p> <p>21 MR. BREEN: Objection. Form.</p> <p>22 THE DEPONENT: I would believe that</p>	<p style="text-align: right;">357</p> <p>1 was meetings. You know, my -- I couldn't</p> <p>2 recollect the frequency, but it appears to be at</p> <p>3 least there was an annual meeting.</p> <p>4 MR. GASTWIRTH: I am going to give you</p> <p>5 -- If I could ask the court reporter to mark the</p> <p>6 next one, two, three, four exhibits, 43, 44, 45</p> <p>7 and 46, that would be great. Thank you.</p> <p>8 (Exhibit Berkle 043, Exhibit Berkle</p> <p>9 044, Exhibit Berkle 045 and Exhibit Berkle 046</p> <p>10 were marked.)</p> <p>11 MR. BREEN: Do you have any of these</p> <p>12 for Roxane?</p> <p>13 MR. GASTWIRTH: I'm going through these</p> <p>14 right now.</p> <p>15 BY MR. GASTWIRTH:</p> <p>16 Q. Now, again, Mr. Berkle this is just</p> <p>17 what I could locate in my car in response to the</p> <p>18 suggestion that Roxane didn't have board of</p> <p>19 minutes direct -- meetings of the board of</p> <p>20 directors, BIC didn't and BIPI didn't.</p> <p>21 MR. BREEN: Counsel, I'm going to</p> <p>22 object to the form.</p>

91 (Pages 358 to 361)

<p style="text-align: right;">358</p> <p>1 MR. FAUCI: I completely agree.</p> <p>2 MR. BREEN: And I have had it with this</p> <p>3 mischaracterization. You asked the man a</p> <p>4 question, I cross-examined to test his knowledge.</p> <p>5 I don't want to hear about what's in your car or</p> <p>6 what -- or you characterizing this stuff on the</p> <p>7 record. That's totally improper. And it's</p> <p>8 totally improper coaching also.</p> <p>9 MR. FAUCI: You have the documents you</p> <p>10 have. Ask questions about them.</p> <p>11 MR. BREEN: So you can ask questions,</p> <p>12 but stop mischaracterizing anything I</p> <p>13 represented. I don't appreciate it.</p> <p>14 BY MR. GASTWIRTH:</p> <p>15 Q. Does -- Exhibit 43, Mr. Berkle, is it</p> <p>16 an agenda for Boehringer Ingelheim Corporation,</p> <p>17 BIC, the board of directors meeting for June 6,</p> <p>18 1995?</p> <p>19 <b>A. For July 6, 1995.</b></p> <p>20 MR. BREEN: Objection. Form.</p> <p>21 THE DEPONENT: It appears to be.</p> <p>22 BY MR. GASTWIRTH:</p>	<p style="text-align: right;">360</p> <p>1 <b>A. That's correct.</b></p> <p>2 Q. Can you please flip to page 17 through</p> <p>3 22 of this document. Did I mark that section?</p> <p>4 <b>A. Yeah, here.</b></p> <p>5 Q. Okay. When you were talking earlier</p> <p>6 about financial statements that were prepared by</p> <p>7 the separate Boehringer entities, does pages 40 -</p> <p>8 - 17 through 21 I believe represent financial</p> <p>9 statements for Roxane?</p> <p>10 <b>A. It appears to be, yes.</b></p> <p>11 MR. FAUCI: Objection. Form. Please</p> <p>12 stop leading the witness.</p> <p>13 THE DEPONENT: It appears to be true</p> <p>14 what you asked.</p> <p>15 BY MR. GASTWIRTH:</p> <p>16 Q. Okay. And can I direct your attention</p> <p>17 to the next exhibit, please.</p> <p>18 <b>A. Uh-huh.</b></p> <p>19 Q. Exhibit 46.</p> <p>20 <b>A. Oh, sorry. Okay.</b></p> <p>21 Q. Exhibit 46 is labeled minutes of the</p> <p>22 meeting of the board of directors Boehringer</p>
<p style="text-align: right;">359</p> <p>1 Q. Okay. And if I could direct your</p> <p>2 attention to Exhibit 44, please. Is Exhibit 44</p> <p>3 minutes of the meeting of the board of directors</p> <p>4 for BIC July 16th, 1996?</p> <p>5 MR. FAUCI: Objection. Foundation.</p> <p>6 THE DEPONENT: It appears to be.</p> <p>7 BY MR. GASTWIRTH:</p> <p>8 Q. Can you please tell me who the board</p> <p>9 members were for BIC July 16th, 1996.</p> <p>10 <b>A. Chairman was Dr. Louis Fernandez, Mr.</b></p> <p>11 <b>Gerstenberg, Dr. Thomas Heil, Dr. Claus Rohleder,</b></p> <p>12 <b>Dr. Jere Goyan and Mr. Vaughn Bryson.</b></p> <p>13 Q. Can I direct your attention to Exhibit</p> <p>14 45, please.</p> <p>15 <b>A. Okay.</b></p> <p>16 Q. Exhibit 45 at the top says Boehringer</p> <p>17 Ingelheim Corporation meeting of the board of</p> <p>18 directors February 28th, 1997.</p> <p>19 <b>A. That's correct.</b></p> <p>20 Q. Earlier today you testified as to</p> <p>21 financial statements being prepared for some of</p> <p>22 the Bert -- Boehringer entities, correct?</p>	<p style="text-align: right;">361</p> <p>1 Ingelheim Corporation October 28th, 1998?</p> <p>2 <b>A. Correct.</b></p> <p>3 Q. Can you please identify who the board</p> <p>4 members were for BIC as of October 28th, 1998?</p> <p>5 <b>A. I believe it's the same list. Dr.</b></p> <p>6 <b>Fernandez as chairman, Dr. -- Mr. Gerstenberg,</b></p> <p>7 <b>Dr. Jo -- no, it's somewhat different, Dr.</b></p> <p>8 <b>Johann, Dr. Heil, Dr. Goyan and Mr. Bryson.</b></p> <p>9 Q. And how many pages is the minutes for</p> <p>10 this board meeting of BIC?</p> <p>11 <b>A. I don't know if I can make that out.</b></p> <p>12 <b>The actual minutes were 17 pages.</b></p> <p>13 Q. And do the minutes reflect what took</p> <p>14 place at this board of directors meeting?</p> <p>15 MR. FAUCI: Objection. Foundation.</p> <p>16 THE DEPONENT: I assume --</p> <p>17 MR. FAUCI: How is he supposed to</p> <p>18 answer that?</p> <p>19 BY MR. GASTWIRTH:</p> <p>20 Q. Okay. Mr. Berkle, were you invited to</p> <p>21 attend this meeting of the board of directors for</p> <p>22 BIC on October 28th, 1998? You can look at the</p>



<p style="text-align: right;">362</p> <p>1 first page.</p> <p>2 <b>A. I was invited for a portion of this</b></p> <p>3 <b>meeting.</b></p> <p>4 Q. Do you recall this meeting now? Does</p> <p>5 this document refresh your recollection?</p> <p>6 <b>A. I don't recall the specific meeting,</b></p> <p>7 <b>but I think I've testified earlier that I did sit</b></p> <p>8 <b>in frequently at BIC board meetings for a portion</b></p> <p>9 <b>of them when I was invited.</b></p> <p>10 MR. GASTWIRTH: Okay. I have no</p> <p>11 further questions.</p> <p>12</p> <p>13 EXAMINATION</p> <p>14 BY MR. BREEN:</p> <p>15 Q. All right. Just a few based upon that.</p> <p>16 I see a bunch of agendas here and</p> <p>17 minutes of meetings of the board of directors of</p> <p>18 Boehringer Ingelheim Corporation.</p> <p>19 <b>A. Uh-huh.</b></p> <p>20 Q. Could you go through that stack of</p> <p>21 things that counsel says he got out of his car</p> <p>22 and pull out all the minutes of meetings of BIPI</p>	<p style="text-align: right;">364</p> <p>1 board meetings of Roxane or BIPI.</p> <p>2 <b>A. The Roxane documents reflect directors</b></p> <p>3 <b>and officers for Roxane. There are no minutes</b></p> <p>4 <b>attached.</b></p> <p>5 Q. Now, the fact of the matter is that</p> <p>6 none of these documents cause you to sit here</p> <p>7 right now and remember any -- attending any</p> <p>8 particular board meeting for any particular</p> <p>9 company, does it?</p> <p>10 MR. GASTWIRTH: Objection. Form.</p> <p>11 THE DEPONENT: As I said, I was not a</p> <p>12 member of the board of directors for BIPI. I was</p> <p>13 for Roxane, but I -- you know, I've stated before</p> <p>14 and I'll stick to my statement that I don't</p> <p>15 recall specifics.</p> <p>16 BY MR. BREEN:</p> <p>17 Q. I understand that. I'm not -- I'm not</p> <p>18 arguing that, but counsel's questions were --</p> <p>19 several times he said, quote, Does this refresh</p> <p>20 your recollection. That means something under</p> <p>21 the rules of evidence, so I just want the record</p> <p>22 to be clear.</p>
<p style="text-align: right;">363</p> <p>1 and all the meetings of minutes of Roxane's</p> <p>2 boards.</p> <p>3 <b>A. Here's BIPI.</b></p> <p>4 Q. Was that a -- minutes of a meeting or</p> <p>5 is that just a list of people that are appointed</p> <p>6 to the board?</p> <p>7 <b>A. The pages I have really is a resolution</b></p> <p>8 <b>for adoption of appointment of officers at the</b></p> <p>9 <b>annual meeting of the board of directors for</b></p> <p>10 <b>BIPI.</b></p> <p>11 Q. Any minutes of a meeting there in that</p> <p>12 document?</p> <p>13 <b>A. No.</b></p> <p>14 Q. Not like you saw for BIC, right? For</p> <p>15 BIC they've got -- they've got all these minutes</p> <p>16 and agendas and all that stuff, right?</p> <p>17 <b>A. Well, in this particular document, no,</b></p> <p>18 <b>there's no minutes attached.</b></p> <p>19 Q. Okay. Well, go through all -- Take</p> <p>20 your time because counsel brought all these</p> <p>21 documents in from the trunk of his car, see if</p> <p>22 there's any actual minutes and agendas of any</p>	<p style="text-align: right;">365</p> <p>1 The exhibits that counsel has shown you</p> <p>2 in this -- since coming back into the room, none</p> <p>3 of that causes you to sit here and have a present</p> <p>4 recollection of having attended a particular</p> <p>5 meeting, does it?</p> <p>6 MR. GASTWIRTH: Objection. Form.</p> <p>7 BY MR. BREEN:</p> <p>8 Q. When I say present recollection, you're</p> <p>9 thinking back and in your own mind right now you</p> <p>10 remember a particular meeting and being there.</p> <p>11 <b>A. I don't remember a specific meeting.</b></p> <p>12 Q. Okay. Now, this -- I'm not sure which</p> <p>13 exhibit -- May I reach over here?</p> <p>14 <b>A. Sure.</b></p> <p>15 Q. I just want to speed things up a little</p> <p>16 bit. I think it's this one. Which one is this</p> <p>17 one, do you know? Which number?</p> <p>18 <b>A. 45?</b></p> <p>19 MR. GASTWIRTH: No. It's --</p> <p>20 THE DEPONENT: Sorry.</p> <p>21 MR. BREEN: I'm sorry. It looks like</p> <p>22 it, but it's not that one.</p>